

A decorative background consisting of several overlapping squares in various colors including olive green, teal, orange, red, and light green, arranged in a scattered pattern.

The American Rescue Plan Act – Final Rule Overview Webinar with Barnes & Thornburg LLP

CONFIDENTIAL © 2021 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion of Barnes & Thornburg LLP.



Final Rule vs. Interim Final Rule

- Provided by Department of Treasury on January 6, 2022
- Replaces the Interim Final Rule as implementing regulation and guidance regarding State and Local Fiscal Recovery Funds
 - Final Rule becomes effective on April 1, 2022 and after April 1, 2022 units must comply with the Final Rule and cannot rely on the Interim Final Rule
 - However, units may proceed under the Final Rule beginning on January 6, 2022 and Treasury will not take action to enforce the Interim Final Rule for funds used consistent with the Final Rule during the period from January 6, 2022 to April 1, 2022
 - If significant steps have been taken to obligate funds in a manner consistent with the Interim Final Rule prior to January 6, 2022 (initiation of procurement, grant making actions, detailed planning of projects or programs, and/or appropriation of funds) Treasury will not take steps to enforce the Final Rule in the event its terms are more restrictive than the Interim Final Rule

Overview – Permissible Uses

- Public health and economic impacts
- Premium pay for essential workers
- Replacing lost public sector revenue
- Investments in infrastructure
 - Water
 - Sewer
 - Broadband

Overview – Exclusions

- Section 603(2) - No metropolitan city, nonentitlement unit of local government, or county may use funds made available under this section for deposit into any pension fund.
 - With the clarification that regularly sized and timed contributions to a pension incident to another eligible use such as providing compensation for public health and safety staff is permissible.
 - Larger than regular, at a different time than regular, or otherwise extraordinary pension fund deposits to address accrued unfunded liabilities are not permitted.
- Funds of any kind shall not be used for “rainy day” or reserve funds, or debt service payments,
- Funds of any kind shall not be used for satisfaction of settlements, judgements, consent decrees, or judicially confirmed debt restructuring arising from any judicial, administrative, or regulatory proceeding.
 - However, if a settlement requires the provision of services that are an eligible use of SLFRF funds, the funds may be used to provide such services.
- Non-Revenue Loss Recovery funds may not be used as non-federal match, unless specifically authorized by the underlying/source federal program.
 - However, local communities may use their funds to match other state and local government allocations of Treasury ARPA Recovery Funds, if used within the local community.
 - **While Revenue Loss Funds may be used for the non-federal match requirements of other federal programs**, they cannot be used for the non-federal share of Medicaid or CHIP.
- SLFRF Funds may not be used for any project that conflicts with or contravenes the purposes of the ARPA (such as undermining COVID-19 mitigation practices that are in line with CDC guidance)

Public Health– New Items

- Expanded lists of eligible projects and programs
 - Public Health:
 - COVID-19 prevention and treatment equipment (such as ambulances and ventilators),
 - Transportation to reach vaccination or testing sites,
 - Construction of medical facilities dedicated to COVID-19 mitigation and treatment (ICUs/Emergency Rooms),
 - Temporary medical facilities to enhance COVID-19 treatment capacity,
 - Emergency operations centers,
 - Emergency response equipment (including radio systems)
 - Public telemedicine capability enhancements for COVID-19 treatment
 - Medical Expenses
 - Paid family and medical leave for public employees to enable compliance with COVID-19 precautions
 - Behavioral Health
 - Outreach to individuals not yet engaged in treatment
 - Long-term recovery support
 - Enhanced behavior health services in schools
 - Services to pregnant women or infants born with neonatal abstinence syndrome
 - Peer support groups, supporting housing or recovery housing
 - Evidence based services for opioid use disorder prevention, treatment, and recovery
 - Behavior health facilities and equipment
 - Responding to violence
 - Referrals to trauma recovery services
 - Evidence based practices such as focused deterrence with wraparound services
 - In communities experiencing increased gun violence: additional officers focused on community policing, enforcement efforts including prosecution, law enforcement technology and equipment to support responses.

Economic Impacts – New Items

- Definitions for Low-Income and Moderate-Income Households
 - Low-income: Income at or below 185 percent of the Federal Poverty Guidelines (FPG) for the size of its household or income at or below 40 percent of the Area Median Income (AMI) for its county for the size of its household
 - Moderate-income: Income at or below 300 percent of the FPG for the size of its household or Income at or below 65 percent of the AMI for its county and size of household
- More clarity on households considered “impacted” and “disproportionately impacted”
 - Impacted; (i) low or moderate income, (ii) experienced unemployment, (iii) experienced food or housing insecurity, (iv) qualified for CHIP, CCDF, and/or Medicaid
 - Disproportionately Impacted; (i) low-income, (ii) residing in a QCT, (iii) qualified for TANF, SNAP, NSLP, SBP, Medicare Part D, SSI, Head Start, WIC, LIHEAP, Section 8 Vouchers, or Pell Grant Assistance

Economic Impact – New Items

- Expanded lists of eligible projects and programs
 - Impacted Communities
 - Health insurance coverage expansion
 - Development of Job & Workforce Training Centers
 - Financial Services to the unbanked or underbanked
 - Paid sick, medical & family leave programs
 - Childcare and early learning services
 - Assistance to address the impact of learning loss for K-12 students
 - Impacted students eligible are those that lost access to in-person instruction for a significant period of time
 - Development of Affordable Housing (for qualified households)
 - Impacted households eligible for affordable housing assistance must qualify under National Housing Trust Fund or Home Investment Partnerships Program rules
 - Deposits to the Unemployment Insurance Trust Fund
 - There are new limits placed on these deposits, their amount may not exceed the outstanding balance of Title XII advances and deposits trigger the obligation that the depositor may not take action to reduce benefits available to unemployed workers by changing the computation of maximum benefit entitlement

Economic Impact – New Items

- Expanded lists of eligible projects and programs
 - Disproportionately Impacted Communities
 - Community health workers to assist in accessing health and social services
 - Remediation of lead paint or other lead hazards
 - Primary care clinics, hospitals, investments in medical equipment & facilities designed to address health disparities
 - Investments in neighborhoods to promote improved health outcomes
 - Improvements to and environmental remediation of abandoned or vacant properties
 - Schools and other educational equipment or facilities

Economic Impact – New Items

- Small Business Assistance
 - “increased costs” now a trigger a small business to be considered “impacted by the pandemic”
 - “disproportionately impacted small business” is defined as a small business operating in a QCT
 - Additional assistance including; (i) rehabilitation of commercial properties/storefronts/facades, (ii) business incubation, start-up and expansion grants, (iii) and support for microbusiness (childcare, transportation, and financial) are eligible for these small businesses
- Non-Profit Assistance
 - “Increase costs (uncompensated increases in service need)” now a trigger for non-profit be considered “impacted by the pandemic”
- Aid to Impacted Industries
 - “Impacted industry” definition expanded to include industries that experienced 8% employment loss from pre-pandemic levels.
- Public Sector Staffing
 - Under the IFR local units could re-hire public sector staff to pre-pandemic levels, under the Final Rule they are permitted to hire above pre-pandemic levels or to add/modify roles up to 7.5% above pre-pandemic staffing levels, funds may only be used for employees hired after March 3, 2021
 - Local units are also permitted to provide replaces wages for employees who experienced pay reductions or furloughs due to the pandemic, to prevent layoffs or reductions in wages where SLFRF funds are necessary for the purpose, or to provide retention incentives and/or reasonable increases in compensation to public employees.
- Public Sector Capacity
 - Can use SLFRF Funds to improve access to and user experience of government IT systems, and to improve technology to increase public access to and delivery of government services
 - Can use SLFRF Funds to address backlogs caused by government shutdown, or to address increased repair or maintenance needs
 - Can use SLFRF Funds to adapt government operations to the pandemic, such as by acquiring video-conferencing software

Capital Expenditures

- Under the IFR it was unclear if capital expenditures were contemplated in responding to COVID-19, the Final Rule explicitly states that capital expenditures are eligible if they are responding to the COVID-19 Public Health Emergency and its Negative Economic Impact
- Capital Expenditures of less than \$1,000,000 do not require written justification. If a capital expenditure or capital expenditures incident to one project or program is/are above \$1,000,000 a written justification will be required and depending on the amount and nature the expenditure such justification may be required to be reported to the Treasury with a units regular reporting on SLFRF Fund use.
 - A written justification includes; (i) identifying the harm to be addressed, (ii) explanation of why a capital expenditure is appropriate to the harm, and (iii) comparison of the proposed capital expenditure to two alternatives identifying why the chosen capital expenditure is superior.
- Ineligible Capital Expenditures include:
 - Construction of new correctional facilities as a response to increased crime rates
 - Construction of new congregate facilities to decrease spread of COVID-19 in the facility
 - Construction of Convention Centers, Stadiums, or other large capital projects intended for general economic development or aid to impacted industries.

Premium Pay for Essential Workers

- Clarification that Premium Pay can be in a lump sum or installments and that Premium Pay can be awarded to eligible workers performing essential work regardless of their being part-time, salaried, hourly, or non-hourly workers.
- Under the IFR written justification was required for Premium Pay that would result in an employee receiving compensation in excess of 150% of average annual wage for all occupations in the County or State of residence of the employee.
- Under the Final Rule if the employee receiving premium pay is not exempt from the overtime provision of the Fair Labor Standards Act then written justification is not required even if premium pay would result in compensation above the 150% threshold.
- The Final Rule also clarifies that premium pay may not be paid to persons who are volunteers.

Replacing Lost Public Sector Revenue

- Under the Final Rule local units have two options for determining the portion of their award that may be treated as “Revenue Loss” and thus be used to provide government services generally with streamlined reporting and compliance obligations.
- The first option is the revenue loss calculation formula which is to be made on December 31 of each of 2020, 2021, 2022, and 2023 **(or the last day of the local units fiscal year in each of these years)**.
 - The formula has been adjusted to include an **increased counterfactual growth assumption of 5.2%** and an adjusted definition of general revenues
- **The second option is to make a one time election to be treated by the Treasury as having experienced up to \$10,000,000 or the full amount of the unit’s award, whichever is smaller, of Revenue Loss over the full program period.**
 - **For units with less than \$10,000,000 in SLFRF Funds awarded to them this will mean that you may use your full award for the provision of general government services.**
- General government services include any service traditionally provided by government including construction of schools, hospitals, roads and other infrastructure, general government administration including staffing and facilities, environmental remediation, and the provision of police, fire and other public safety services (including the purchase of equipment and vehicles).

Investments in Infrastructure: Water and Sewer

- In addition to those water and sewer infrastructure projects that were eligible under the IFR (eligible under the EPA CWSRF or DWSRF Programs) the Final Rule adds the following projects to the eligibility list when such projects are (i) responsive to an identified need to maintain or achieve an adequate level of service in light of reasonable projections of future increased need, (ii) a cost effective means for meeting the need, and (iii) estimated to be sustainable over the projected useful life if the project in question is a drinking water project.
 - Culvert repair, resizing, and removal and replacement of storm sewers
 - Infrastructure to improve drinking water access for those served by wells, including testing, treatment and remediation
 - Dam and reservoir rehabilitation where the project is necessary for the provision of drinking water from the reservoir
 - Lead remediation projects that would be eligible under the EPA WIIN Act grant programs including corrosion control, line replacement, compliance monitoring, and replacing internal plumbing, faucets, and fixtures in child care and school facilities.

Investments in Infrastructure: Broadband

- Broadens households that can be served by projects from households without reliable wireline 25 Mbps/3 Mbps Service to households and locations without reliable wireline 100/Mbps/20 Mbps Service.
- The Final Rule adds a requirement that the service provider operating broadband infrastructure network built out using SLFRF Funds must participate in the Federal Communications Commission's (FCC) Affordable Connectivity Program (ACP), or otherwise provide access to a broad-based affordability program to low-income consumers in the proposed service area of the broadband infrastructure that provides benefits to households commensurate with those provided under the ACP.
- The Final Rule adds the ability to use SLFRF Funds to modernize cybersecurity measures in place to protect both new and existing broadband infrastructure including both hardware and software projects.

KEY HIGHLIGHTS

1. Final Rule effective April 1, 2022 – but units can take advantage of the Final Rule now
2. Up to \$10,000,000 can be categorized as Revenue Loss foregoing the revenue loss formula
3. Clarification has been provided that capital expenditures can be made to respond to the public health and negative economic impacts of COVID-19
4. Definitions of Impacted and Disproportionately Impact have been clarified
5. Authorization has been provided for rehiring local government staff even above pre-pandemic levels
6. Allows spending on modernization of cybersecurity including both hardware and software
7. Final Rule broadens the Water, Sewer, and Broadband infrastructure that is eligible

Q&A